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Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

re: Soul Quest Church of Mother Earth, Inc., et al. v. US Drug Enforcement Admin., et al,
Appeal No. 22-11072 (11th Cir.)

To Whom It May Concern:

Pursuant to Fed.R.App.P. 28(j) the undersigned counsel hereby advises the Clerk of a pertinent, recent filing by the Appellee in another matter involving an ayahuasca church's assertion of rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (hereinafter, "RFRA"). The Appellants seek not to assert new arguments, but rather to provide "pertinent and significant legal authority" that comes to their attention "after oral argument but before decision" Hernandez Lara v. Barr, 962 F.3d 45, 52 (1st Cir. 2020). As used herein, supplementing the record is not limited to case jurisprudence but can simply "[inform] the court of important developments in related court proceedings (about which [the court] may take judicial notice), so long as those developments have a direct relation to the matters at issue." Loughran v. Wells Fargo Bank, N.A., 2 F.4th 640, 652 (7th Cir. 2021) (internal citations omitted).

In Church of the Eagle & Condor, et al. v. Garland, et al., (D. Az. 2023), Case No.: CV-22-01004-PHX-SRB, (Dk. 23, at p. 10-11) (hereinafter, "Eagle & Condor"), a case also involving an ayahuasca church's assertion of the Government's infringements on rights articulated under RFRA, the Government made assertions of law running completely contrary to its arguments in the case-at-bar. In Eagle & Condor, the Department of Justice, arguing on behalf of the Drug Enforcement Administration, asserted that ayahuasca churches *are required* to first submit to the Respondent DEA's "registration process" for a "RFRA exemption." Yet, in its arguments before this Court on January 25, 2023, the Appellee argued that there was no requirement for an ayahuasca church to submit to such a "registration process" for exemption. A copy of the Government's filing in Eagle & Condor is attached hereto as Exhibit A.

SQCME|DEA: LETTER TO CLERK RE: SUPPLEMENTAL AUTHORITY
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The inconsistencies underlying the Appellee's arguments in the case-at-bar, as well as the further reflection on the lack of any cohesive standards or legal authority under the Appellee's efforts to impose *ad hoc* rules upon ayahuasca churches and its members, necessitate the instant filing.

Sincerely,



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Enclosure

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Exhibit A

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10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13
14 The Church of the Eagle and the Condor *et*
15 *al.*,

16 Plaintiffs,

17 vs.

18 Merrick Garland *et al.*,

19 Defendants.*
20
21
22
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26

22-cv-01004

MOTION TO DISMISS

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* Christopher Magnus no longer serves as Commissioner of U.S. Customs and Border Protection and should be substituted with Troy Miller in his official capacity as Acting Commissioner of Customs and Border Protection as a Defendant in this case pursuant to Federal Rule of Civil Procedure 25(d).

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1 Defendants hereby move to dismiss Counts 1 through 7 of Plaintiffs' Complaint
2 (Doc. 1) with prejudice, or, in the alternative, to stay the case while Plaintiffs pursue a religious
3 exception from the Drug Enforcement Administration (DEA). This motion is supported by
4 the following memorandum of points and authorities and by all matters of record.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 This case concerns a hallucinogenic substance called dimethyltryptamine (DMT).
7 Under the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, the importation and use
8 of substances listed in Schedule I are strictly controlled due to the high risk of abuse and lack
9 of accepted medical use, *id.* § 812(b)(1). To that end, anyone seeking to handle such controlled
10 substances must register with DEA. 21 U.S.C. §§ 823, 954; 21 C.F.R. §§ 1301.01-1301.52.
11 DMT is included in Schedule I.

12 According to the Complaint, more than two years ago, a package addressed to a
13 Plaintiff in this action arrived at the Port of Los Angeles from Peru. That package contained
14 ayahuasca, a tea brewed from plants containing DMT. Plaintiffs do not allege to have had an
15 import registration. U.S. Customs and Border Protection (CBP) seized the package. Plaintiffs
16 allege they received a note from the Department of Homeland Security (DHS) indicating
17 seizure of a controlled substance. Plaintiffs state they never received any other
18 communications from the Government.

19 With those factual allegations, Plaintiffs bring this lawsuit asserting numerous claims,
20 including one under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb–
21 1(b), and several others under the Constitution, all derivative of the RFRA claim. But Plaintiffs'
22 RFRA claim cannot survive for at least two reasons. First, Plaintiffs have not demonstrated
23 standing. And, second, Plaintiffs have failed to state a claim under Rule 12(b)(6) as they have
24 not adequately alleged that their religious beliefs have been substantially burdened. To that
25 end, this Court should dismiss Counts 1 through 7 of Plaintiffs' Complaint with prejudice.

26 Plaintiffs make an extraordinary request for relief with this lawsuit: that the Court order
27 DEA to grant a religious exemption Plaintiffs have never requested. Accordingly, and as an
28

alternative basis for resolving this motion, Defendants request that the Court exercise its discretion to decline to review Plaintiffs' claims until after they have sought an exemption from DEA. Doing so would allow DEA to evaluate in the first instance whether Plaintiffs are eligible for an exemption, including but not limited to determining whether Plaintiffs can adequately protect against the risk that the controlled substance would be diverted.

I. BACKGROUND

A. Statutory and Regulatory Background

The CSA regulates the use of psychotropic substances, including "Schedule I" controlled substances, which are strictly controlled owing to the high risk of abuse and lack of accepted medical use. 21 U.S.C. § 812(b)(1). As relevant here, DEA has authority to register an applicant to import, distribute, dispense, or manufacture the hallucinogenic compound N, N-dimethyltryptamine, known as DMT, and substances containing it, when doing so is consistent with the public interest. *Id.* § 823(b); 21 C.F.R. § 1301.31.

Through the CSA, Congress created a closed regulatory system to control and monitor controlled substances in the United States. Under this system, all parties—including health care professionals, pharmacists, medical researchers, and religious adherents—wishing to handle controlled substances must register with DEA. 21 U.S.C. §§ 823, 954; 21 C.F.R. §§ 1301.01-1301.52. This registration system ensures that controlled substances are safely handled and properly safeguarded to prevent loss, theft, and diversion to illicit use. 21 U.S.C. §§ 823, 958. DEA is statutorily authorized to create exemptions from the CSA's prohibitions. *Id.* § 823. Prior to *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (O Centro)*, 546 U.S. 418 (2006), no process existed for an individual who wished to use a controlled substance for religious purposes to obtain formal permission to do so. That is no longer the case.

In response to *O Centro*, DEA created a religious-exemption process for petitioners who establish that the CSA burdens their sincere religious beliefs.¹ Referred to herein as the

¹ U.S. Dep't. of Justice, Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act, (Nov. 20,

Guidance, this process allows DEA to consider a petitioner's request based on their sincere religious belief to be granted a registration to manufacture, distribute, dispense, import, export, use, or possess a controlled substance for religious purposes or to otherwise be exempted from provisions of the CSA and its implementing regulations for religious purposes. Importantly, this process also allows DEA to, among other things, weigh an individual's or organization's proposed safeguards to ensure that the controlled substance will not be diverted to illegal uses and to consider the risks of harm posed by a particular substance. That is because, under the CSA, DEA may only register an applicant to handle a Schedule I substance when doing so is consistent with the public interest. 21 U.S.C. §§ 823, 958. DEA considers a number of factors in evaluating religious-exemption applications, including but not limited to whether the registrant would maintain effective controls against diversion.² For example, the Guidance asks a petitioner to list "each specific religious practice" involving the controlled substance, as well as "the amounts, conditions, and locations of its anticipated manufacture, distribution, dispensing, importation, exportation, use or possession." Guidance, *supra* note 1, at 1-2.

Any DEA registrant wishing to import controlled substances into the United States must apply for a permit each time it wishes to import the substance, and the approved permit must accompany the shipment. 21 C.F.R. §§ 1301.34, 1312.11-1312.14. CBP relies on DEA's import-permitting system to ensure only lawfully imported controlled substances enter the country. As a matter of course, if CBP intercepts a nonpermitted Schedule I controlled substance, CBP will seize and summarily forfeit the substance. *Id.* § 1312.15.

2020) [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-5\)\(EO-DEA-007\)\(Version2\)RFRA_Guidance_\(Final\)_11-20-2020.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)(EO-DEA-007)(Version2)RFRA_Guidance_(Final)_11-20-2020.pdf) (last visited Nov. 15, 2022) (Guidance).

² DEA regulations require, inter alia, security, storage, and theft/loss avoidance measures, 21 C.F.R. §§ 1301.71-1301.76; record-keeping and inventory regarding importation, receipt, distribution, and disposal of controlled substances, *id.* §§ 1304.21-1304.22; DEA access for inspections and audits, 21 U.S.C. § 880; 21 C.F.R. §§ 1316.01-1316.13; and employee screening procedures, 21 C.F.R. §§ 1301.90-1301.93.

B. Factual Allegations

Plaintiff the Church of the Eagle and the Condor (CEC) alleges it is “a religion rooted in Indigenous spirituality whose essential sacrament is the holy tea, *ayahuasca*.” Compl. ¶ 16; *see id.* ¶ 2 (“The Church is a religious community dedicated to the spiritual reunification of humanity in fulfillment of the Prophecy of the Eagle and the Condor.”). *Ayahuasca* is a tea brewed from plants containing DMT, a Schedule I controlled substance under the CSA. *See id.* ¶¶ 16, 25. Plaintiff Joseph Tafur acts as “Spiritual Leader” of the Church as well as “ceremonialist for the *ayahuasca* ceremony.” *Id.* ¶¶ 1, 42. Other Plaintiffs include a member of the Board of Directors and three additional members, all of whom, the Complaint states, “are aware that *ayahuasca* is proscribed by law” and are “violating and intend to continue to violate applicable law.” *Id.* ¶¶ 16-19, 44, 77. Plaintiffs allege they have been meeting over the past four years “for prayer, ceremonies, gatherings, and sweat lodges.” *Id.* ¶ 44.

More than two years ago, in September 2020, Plaintiffs allege CBP “interdicted *ayahuasca* being sent” to Plaintiffs from “Peru through the Port of Los Angeles.” *Id.* ¶ 50. The Complaint states that Tafur “received a small, approximately 3” x 2.5” note displaying the [DHS] seal and the following text”:

Notice: Narcotics and/or other contraband prohibited from entry into the United States, have been seized and removed for appropriate action under 19CFR145.509. You will be receiving correspondence from our Fines, Penalties and Forfeitures Branch in the near future.

Id. Plaintiffs state there was “no further correspondence” following receipt of the alleged note. *Id.* ¶ 52. Plaintiffs have continued, and plan to continue, using *ayahuasca*. *See, e.g., id.* ¶ 44 (stating that CEC and its members “continue on a regular basis, to use *ayahuasca* in ceremonies” and “continue to import, possess, and use their sacrament (*ayahuasca*) and have no plans to stop doing so”); *see also, e.g., id.* ¶¶ 16-19, 77. Plaintiffs do not allege they applied for a religious exemption from the CSA under the Guidance.

C. Procedural Background

Plaintiffs filed this action against Merrick Garland, Attorney General of the United States, Alejandro Mayorkas, Secretary of DHS, Anne Milgram, DEA Administrator, and Christopher Magnus, then-Commissioner of CBP, *see supra* page i, asserting nine claims:

Claim for Relief	Defendant(s)
1 Religious Freedom Restoration Act (RFRA)	All Defendants
2 First Amendment—Free Exercise	All Defendants
3 First Amendment—Establishment of Religion	All Defendants
4 Fifth Amendment—Procedural Due Process	CBP
5 Fifth Amendment—Substantive Due Process	CBP
6 Fifth Amendment—Equal Protection	All Defendants
7 Ninth Amendment—Unenumerated Constitutional Rights	All Defendants
8 Freedom of Information Act	CBP
9 Freedom of Information Act	DEA

Compl. ¶¶ 20-24. Counts 1 through 7 arise from the alleged seizure of improperly imported ayahuasca. As its principal form of relief, Plaintiffs ask this Court for an injunction ordering “Defendants to permit Plaintiffs’ importation, use, preparation of, and distribution . . . of . . . ayahuasca tea . . . and enjoining Defendants from arresting, prosecuting, or threatening Plaintiffs and members . . . with arrest, prosecution, and/or imprisonment.” *Id.* ¶ 89.

Defendants now move to dismiss Counts 1 through 7 without leave to amend,³ or, in the alternative, to stay the case while Plaintiffs pursue a religious exemption from DEA.

II. LEGAL STANDARDS

Under Rule 12(b)(1), the plaintiff bears the burden of establishing subject-matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Rule 12(b)(1) attacks can be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This requires a plaintiff to allege sufficient facts to allow

³ Defendants certify that they attempted to meet and confer with Plaintiffs’ counsel regarding this motion. Plaintiffs declined to amend their complaint.

the court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *see Iqbal*, 556 U.S. at 678-79. Leave to amend the complaint should be denied if “allegations of other facts consistent with the challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

III. LEGAL ARGUMENT

A. Plaintiffs’ RFRA Claim (Count 1) Should Be Dismissed.

This Court should dismiss Plaintiffs’ RFRA⁴ claim on two bases: (1) lack of standing, and (2) failure to state a plausible claim.

1. Plaintiffs’ RFRA Claim Should Be Dismissed for Lack of Standing.

a. Plaintiffs Fail To Allege Any Genuine Threat of Imminent Prosecution.

Plaintiffs ask this Court to enter an injunction ordering “Defendants to permit Plaintiffs’ importation, use, preparation of, and distribution . . . of . . . ayahuasca tea . . . and enjoining Defendants from arresting, prosecuting, or threatening Plaintiffs and members of the Church with arrest, prosecution, and/or imprisonment.” Compl. ¶ 89. But without more, Plaintiffs are not entitled to this relief—and have no standing to claim it.

To demonstrate Article III standing, Plaintiffs must show that each provision they challenge has caused them a concrete and particularized “injury in fact” that is “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). To establish an injury-in-fact to support a claim for injunctive relief, “[p]ast exposure to illegal conduct does not in itself show a present case or controversy.” *Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1151 n.1 (9th Cir. 2017) (alteration in original) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Instead, there must be a “sufficient likelihood that [the plaintiff] will again be wronged

⁴ RFRA, 42 U.S.C. § 2000bb–1(b), provides that the federal government may not substantially burden a person’s sincere exercise of religion, unless doing so is the least restrictive means of advancing a compelling interest.

1 in a similar way.” *Lyons*, 461 U.S. at 111. Where, as here, the allegedly feared future harm is
2 prosecution, there must be a “genuine threat of imminent prosecution,” and “neither the mere
3 existence of a proscriptive statute nor a generalized threat” is sufficient. *Thomas v. Anchorage*
4 *Equal Rts. Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000). Plaintiffs’ broad claim for injunctive
5 relief fails for multiple reasons.

6 **First**, Plaintiffs base their claim for relief entirely on a single allegation of past harm—
7 namely, the alleged September 2020 seizure. Even assuming that the past seizure qualifies as
8 harm, “the Supreme Court has concluded that past exposure to harm is largely irrelevant when
9 analyzing claims of standing for injunctive relief that are predicated upon threats of future
10 harm.” *Nelsen v. King Cty.*, 895 F.2d 1248, 1251 (9th Cir. 1990); *see Lyons*, 461 U.S. at 108.

11 **Second**, Plaintiffs have not demonstrated a threat to initiate proceedings that would
12 support pre-enforcement standing. Plaintiffs fail to allege that Defendants “have
13 communicated a specific warning or threat to initiate proceedings” against them. *Thomas*, 220
14 F.3d at 1139; *see Rossides v. Gonzales*, 210 F. App’x 711, 712 (9th Cir. 2006) (explaining that
15 there is no standing where “[n]o prosecuting authorities have ever communicated a specific
16 threat or warning to initiate proceedings against [plaintiff]”). Rather, Plaintiffs’ allegations
17 involve communications that, at most, constitute generalized statements. The alleged note
18 indicated only that “[n]arcotics and/or other contraband prohibited from entry into the United
19 States, have been seized and removed for appropriate action under 19[]CFR [§] 145.509. You
20 will be receiving correspondence from our Fines, Penalties and Forfeitures Branch in the near
21 future.” Compl. ¶ 50. That communication, which Plaintiffs confirm included no follow-up
22 or any penalty, does not credibly rise to the level of “genuine threat[s] of imminent
23 prosecution,” but rather serves as a general reference to “the mere existence of a proscriptive
24 statute,” which cannot support standing for a pre-enforcement challenge. *Thomas*, 220 F.3d at
25 1139; *see San Diego Cty. Gun Rs. Comm’n v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (citing cases
26 for the proposition that “a general threat of prosecution is not enough to confer standing”).
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1 **Third**, there is also no demonstrated history or pattern of past prosecution or
 2 enforcement against Plaintiffs alleged in the Complaint. Indeed, Plaintiffs have not identified
 3 any past federal prosecutions of anyone for ayahuasca use, further undermining their claim
 4 that they face a genuine threat of imminent prosecution.

5 **b. Plaintiffs Fail To Demonstrate Associational Standing.**

6 Plaintiff CEC appears to assert associational standing to sue on behalf of its members.
 7 See Compl., Caption (stating CEC is suing “on its own behalf, and on behalf of its members”);
 8 *id.* ¶ 7 (“seek[ing] a preliminary order . . . to enjoin Defendants from actually arresting and
 9 prosecuting[] the Church members who partake in the sacramental tea”); see also *id.* Prayer for
 10 Relief ¶¶ 84, 86, 89. An association may bring suit on its members’ behalf when: “(a) its
 11 members would otherwise have standing to sue in their own right; (b) the interests it seeks to
 12 protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the
 13 relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash.*
 14 *State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). Because Plaintiffs do not satisfy the first
 15 or third factor, they fail to demonstrate associational standing.

16 As explained above, *supra* Section III.A.1.a, the Complaint does not sufficiently allege
 17 that any member faces the requisite “genuine threat of imminent prosecution.” *Thomas*, 220
 18 F.3d at 1139. Thus, CEC fails to establish that “at least one of [its] members has ‘suffered
 19 sufficient injury to satisfy the case or controversy requirement of Article III.’” *Ass’n of Pub.*
 20 *Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 949 (9th Cir. 2013) (quoting *Cetacean*
 21 *Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)); see also *W. Watersheds Project v. Kraayenbrink*,
 22 632 F.3d 472, 483 (9th Cir. 2011).

23 Moreover, Plaintiffs’ RFRA claim “requires the participation of individual members in
 24 the lawsuit,” *Hunt*, 432 U.S. at 343, and cannot be brought in a representative capacity. RFRA
 25 requires the Court to identify the contours of “a person’s” sincere religious belief to determine
 26 whether it is substantially burdened and, if so, to decide whether the “application of the burden
 27 to the person” is justified. 42 U.S.C. § 2000bb-1(a)-(b) (emphases added); see also *O Centro*, 546
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1 U.S. at 430-31 (explaining that RFRA contemplates “an inquiry more focused than [a]
2 categorical approach” because it requires “application of the challenged law ‘to the person’—
3 the particular claimant whose sincere exercise of religion is being substantially burdened”);
4 *Short v. Berger*, No. CV-22-00444-PHX-DJH, 2022 WL 1203876, at *12 (D. Ariz. Apr. 22,
5 2022), *appeal filed*, No. 22-15755 (9th Cir. May 18, 2022) (explaining that RFRA “analysis
6 requires the government to consider its actions as applied ‘to the person’ who is affected”).
7 While there are church members identified as Plaintiffs in this lawsuit, the Complaint does not
8 include an individual attestation from each member indicating that their sincerely held religious
9 beliefs are being substantially burdened by the Government’s actions. The Complaint contains
10 only generalized allegations that the Church’s members are “substantially burdened” by federal
11 drug laws. *See, e.g.*, Compl. ¶ 64. These allegations cannot support associational standing.

12 **2. Plaintiffs Fail To State a RFRA a Claim.**

13 Plaintiffs’ RFRA claim also fails to state a claim upon which relief could be granted.
14 RFRA requires a threshold showing that “application of the Controlled Substances Act would
15 (1) substantially burden (2) a sincere (3) religious exercise.” *O Centro*, 546 U.S. at 428. Here,
16 Plaintiffs have fallen far short of that threshold showing.

17 As an initial matter, even assuming that the CEC is in fact “a religion” and “religious
18 community,” as alleged, Compl. ¶ 16, Plaintiffs have failed to satisfy their burden that its
19 alleged members share the same religious beliefs about ayahuasca, and that all practitioners
20 use ayahuasca with a religious mindset. *See O Centro*, 546 U.S. at 428 (requiring “application of
21 the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion
22 is being substantially burdened”); *see also United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir.
23 2016). Plaintiffs “cannot simply point to other groups who have won accommodations for
24 [religious ayahuasca use] . . . and say ‘we’ll have what they’re having.’” *Id.*

25 Moreover, Plaintiffs have failed to plead a substantial burden. On this point, Plaintiffs
26 allege that “seizing Plaintiffs’ sacramental tea and continuing to hold the threat of seizure and
27 criminal prosecution over their heads constitute a substantial burden on Plaintiffs’ religious
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1 practice and beliefs.” Compl. ¶ 64. But, based on these allegations, Plaintiffs fail to sufficiently
 2 plead that they have been or would be “coerced to act contrary to [their] religious beliefs.”
 3 *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc).

4 **First**, a general risk of seizure—or even an actual seizure—of a Schedule I controlled
 5 substance is not itself sufficient proof of a substantial burden where Plaintiffs continue to
 6 practice without seeking a DEA registration to abate the risk of seizure. Here, the Complaint
 7 admits repeatedly that Plaintiffs have continued and plan to continue using ayahuasca. *E.g.*,
 8 Compl. ¶ 44 (“[T]he Church and its members continue to import, possess, and use their
 9 sacrament (*ayahuasca*) and have no plans to stop doing so”); *see also, e.g., id.* ¶¶ 16-19, 77.

10 **Second**, Plaintiffs, as explained above, *supra* Section III.A.1.a, have not pleaded a
 11 genuine threat of actual prosecution. Plaintiffs’ threadbare allegation concerning threat of
 12 prosecution stems from the “small . . . note” received after CBP seized the package containing
 13 ayahuasca. Compl. ¶¶ 50-51. Neither the seizure nor the alleged note can establish any genuine
 14 threat of imminent prosecution. DHS has broad authority to inspect all packages entering the
 15 United States without any individualized suspicion, *United States v. Seljan*, 547 F.3d 993, 999
 16 (9th Cir. 2008), and Plaintiffs do not claim the sole seizure, which occurred more than two
 17 years ago, *id.* ¶ 50, stemmed from any investigation aimed at them. Instead, the seizure resulted
 18 from a lack of registration and a failure to obtain the necessary import permits from DEA,
 19 without which importation of controlled substances is prohibited and subject to seizure as a
 20 matter of course. And again, the note contains no individualized threat of prosecution, but,
 21 rather, a generalized reference to “the mere existence of a proscriptive statute.” *Thomas*, 220
 22 F.3d at 1139; *see supra* Section III.A.1.a. To the extent a reference to “receiving correspondence
 23 from our Fines, Penalties and Forfeitures Branch” can be credibly construed as a threat of
 24 prosecution, Plaintiffs admit that threat never materialized. Compl. ¶ 50.

25 **Last**, Plaintiffs’ grievances stem from the fact that Plaintiffs lack a DEA registration.
 26 But Plaintiffs have not alleged that they applied for and were denied a registration. Nor have
 27 they pleaded that they would be “coerced to act contrary to [their] religious beliefs” by seeking
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1 a RFRA exemption. *Navajo Nation*, 535 F.3d at 1069-70; *see, e.g., United States v. Tawabongva*, 456
 2 F. Supp. 2d 1120, 1132 (D. Ariz. 2006) (finding RFRA plaintiff was not substantially burdened
 3 “by the requirement that he acquire a permit”). If Plaintiffs successfully obtained a registration
 4 through the RFRA exemption process, they could obtain import permits and not risk seizure
 5 of their ayahuasca. While Plaintiffs claim there is “no adequate remedy,” Compl. ¶ 62, this
 6 formal process clearly provides them with a means to pursue the remedy they seek here.

7 **B. Plaintiffs’ Constitutional Claims (Counts 2-7) Should Be Dismissed.**

8 The Complaint asserts six causes of action for constitutional violations: two claims
 9 under the First Amendment, three under the Fifth Amendment, and one under the Ninth
 10 Amendment. But these claims are largely derivative of, and overlapping with, Plaintiffs’ RFRA
 11 claim. None has any factual specificity, or basis in law, and all should be dismissed.

12 **1. First Amendment—Free Exercise (Count 2)**

13 The First Amendment provides that “Congress shall make no law . . . prohibiting the
 14 free exercise” of religion. U.S. Const. amend. I. “In order to establish a violation of the Free
 15 Exercise Clause, a plaintiff must establish that the challenged conduct resulted in an
 16 impairment of the plaintiff’s free exercise of genuinely held beliefs.” *Williams v. California*, 764
 17 F.3d 1002, 1011 (9th Cir. 2014). Critically, though, “the right of free exercise does not relieve
 18 an individual of the obligation to comply with a valid and neutral law of general applicability
 19 on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or
 20 proscribes).” *Id.* at 1011-12 (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990)). Put
 21 differently, “the Free Exercise Clause does not inhibit enforcement of otherwise valid
 22 regulations of general application that incidentally burden religious conduct.” *Christian Legal*
 23 *Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.27 (2010).
 24 That is exactly the case here. Plaintiffs do not appear to contest that the CSA is a neutral law
 25 of general applicability. *See* Compl. ¶¶ 67-68. And, as discussed earlier, *supra* Section III.A.2,
 26 Plaintiffs have not shown that a governmental action has substantially burdened their religious
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1 practice, as Plaintiffs admit in the Complaint that they continue to practice their religion and
 2 participate in ayahuasca ceremonies. *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

3 2. First Amendment—Establishment of Religion (Count 3)

4 Plaintiffs allege that the Government’s accommodation (emerging from litigation prior
 5 to issuance of DEA’s Guidance) of two other religious groups, to the exclusion of CEC,
 6 violates the Establishment Clause of the First Amendment. Compl. ¶¶ 68-69; *see O Centro*, 546
 7 U.S. 418 (2006); *Church of the Holy Light of the Queen v. Mukasey (CHLQ)*, 615 F. Supp. 2d 1210
 8 (D. Or. 2009).

9 The Establishment Clause prohibits the Government from enacting a law “respecting
 10 an establishment of religion.” U.S. Const. amend. I. The Supreme Court has explained that
 11 the Establishment Clause “means at least this: Neither a state nor the Federal Government
 12 can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer
 13 one religion over another. . . . [T]he [Establishment] [C]lause . . . was intended to erect a ‘wall
 14 of separation between Church and State.’” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947)
 15 (quoting *Reynolds v. U.S.*, 98 U. S. 145 (1878)); *see also Williams*, 764 F.3d at 1013.

16 Plaintiffs offer no factual allegations to support their Establishment Clause claim
 17 except simply pointing to two other organizations. But the Complaint’s reliance on UDV and
 18 CHLQ as comparators is misplaced: both of those cases involve differently situated Plaintiffs,
 19 and both pre-dated the Guidance process as an available means of seeking a religious
 20 exemption. In *O Centro*, on appeal from a preliminary injunction, the Supreme Court held that
 21 RFRA requires “case-by-case consideration of religious exemptions” even for “exceptionally
 22 dangerous” Schedule I substances. 546 U.S. at 430-36. In *O Centro*, however, the federal
 23 authorities had actually “threatened [the plaintiffs] with prosecution,” *id.* at 425, and applied
 24 the CSA without exception, *id.* at 430. Since *O Centro*, DEA has considered religious-based
 25 exemptions through the Guidance process that Plaintiffs apparently have declined to use. And
 26 *CHLQ*, the other case the Complaint references, likewise predated the Guidance. Plaintiffs’
 27 bare contention that they are “in the same position” as the Plaintiffs in those cases cannot
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1 serve as the basis for an Establishment Clause claim, particularly given the intervening issuance
2 of the Guidance, which was designed to facilitate the very accommodations that the Court
3 found lacking in *O Centro*. Yet Plaintiffs ignore this Guidance, both factually and legally.

4 **3. Fifth Amendment—Procedural Due Process (Count 4)**

5 Plaintiffs’ allegation that CBP’s September 2020 seizure of the ayahuasca package
6 suffices to make out a Procedural Due Process claim is likewise flawed. Plaintiffs allege that
7 the seizure of their ayahuasca “without any notice and without an opportunity to be heard
8 deprived Plaintiffs of their ownership, possession, and use of their sacramental tea, *ayahuasca*.”
9 Compl. ¶ 71. But because they have not shown a cognizable property interest in the package,
10 Plaintiffs’ claim must be dismissed.

11 Due process requirements “do not apply unless [Plaintiffs] can first show that [they
12 have] a cognizable liberty or property interest.” *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th
13 Cir. 1990). “Where there is no right, no process is due under the Constitution.” *Id.* Here,
14 Plaintiffs have not shown they have a property interest in a package containing a controlled
15 substance imported without a permit. “To have a property interest in a benefit, a person clearly
16 must have more than an abstract need or desire for it. He must have more than a unilateral
17 expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents*
18 *of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). *Roth*, 408 U.S. 564, 577 (1972). Property interests
19 “are created and their dimensions are defined by existing rules or understandings that stem
20 from an independent source such as state law,” which is to say, the “rules or understandings
21 that secure certain benefits and that support claims of entitlement to those benefits.” *Id.*

22 In this case, no person or entity has an entitlement to import a controlled substance
23 without an importation permit under the CSA. To the contrary, under the “existing rules,”
24 when CBP intercepts a non-permitted Schedule I controlled substance, CBP will seize the
25 shipment, and it will be forfeited. *See* 21 C.F.R. § 1312.15.

1 **4. Fifth Amendment—Substantive Due Process (Count 5)**

2 Plaintiffs' Substantive Due Process claim against CBP also lacks merit. In support of
3 this claim, Plaintiffs allege that CBP, "in confiscating [their ayahuasca], in continuing to
4 threaten prosecution of Plaintiffs, in continuing threats to confiscate the sacrament and to
5 prosecute Plaintiffs and other members of the Church who in the future attempt to worship
6 according to the central tenets of their religion," violated the Due Process Clause of the Fifth
7 Amendment. Compl. ¶ 73.

8 But this claim fails as a matter of law. Where, as here, "a particular Amendment
9 provides an explicit textual source of constitutional protection against a particular source of
10 government behavior, that Amendment, not the more generalized notion of substantive due
11 process, must be the guide for analyzing these claims." *Simon v. Henning*, No. EDCV 13-2281
12 RGK (MAN), 2014 WL 12853094, at *5 (C.D. Cal. Jan. 7, 2014) (quoting *Albright v. Oliver*, 510
13 U.S. 266, 273 (1994)). Here, because Plaintiffs' claims are grounded in the First Amendment's
14 right to free exercise, Plaintiffs cannot also pursue a generalized substantive due process claim
15 under the Fourteenth Amendment. *See, e.g., Simon*, 2014 WL 12853094, at *5 (dismissing
16 substantive due process claim on this basis).

17 **5. Fifth Amendment—Equal Protection (Count 6)**

18 Plaintiffs' Equal Protection claim also cannot survive this motion. As the basis of this
19 claim, Plaintiffs state that Defendants' alleged "denial of the use of ayahuasca" violates the
20 Due Process Clause of the Fifth Amendment because "Plaintiffs are similarly situated to other
21 churches," such as UDV and Santo Daime, "that are not denied such rights." Compl. ¶ 75.

22 To make out "a violation of the Equal Protection Clause of the Fourteenth
23 Amendment a plaintiff must show that the defendants acted with an intent or purpose to
24 discriminate against the plaintiff based upon membership in a protected class." *Barren v.*
25 *Harrington*, 152 F.3d 1193, 1194-95 (9th Cir. 1998) (citing *Washington v. Davis*, 426 U.S. 229,
26 239-40, (1976)); *see also Gutierrez v. Mun. Court of the Se. Jud. Dist.*, 838 F.2d 1031, 1047 (9th Cir.
27 1988) (explaining that purposeful discrimination is an essential element of an equal protection
28 claim). Here, even assuming Plaintiffs have made a sufficient showing that they are members

1 of a protected class, they have plainly not provided any allegations of purposeful
 2 discrimination, much less any allegations based on protected status. As described above, the
 3 two groups Plaintiffs describe are differently situated. *See supra* Section III.B.2.

4 Moreover, the Equal Protection claim is entirely dependent on Plaintiffs' flawed RFRA
 5 claim. RFRA itself, as a matter of law, requires an individualized determination "to the
 6 person." 42 U.S.C. § 2000bb-1(a)-(b); *see O Centro*, 546 U.S. at 430-36 (requiring "case-by-case
 7 consideration of religious exemptions"); *see also* Guidance, *supra* note 1. An Equal Protection
 8 claim, which depends on differential treatment among the same members of a protected class,
 9 cannot logically survive where the underlying right depends on the *individualized* assessment of
 10 the religious beliefs of a particular group. For that separate reason, Plaintiffs' Equal Protection
 11 claim must be dismissed.

12 6. Ninth Amendment—Unenumerated Rights (Count 7)

13 This Court should also dismiss Plaintiffs' Ninth Amendment claim, which is
 14 undeveloped, conclusory, and lacks merit. The Ninth Amendment "has not been interpreted
 15 as independently securing any constitutional rights for purposes of making out a constitutional
 16 violation." *San Diego Cty. Gun Rts. Comm.*, 98 F.3d at 1125 (quoting *Schowengerdt v. United States*,
 17 944 F.2d 483, 490 (9th Cir. 1991)). Indeed, as this Court has explained, the Ninth Amendment
 18 is not "a source of substantive rights." *Jamali v. Maricopa Cnty.*, No. CV-13-00613-PHX-DGC,
 19 2013 WL 5705422, at *3 (D. Ariz. Oct. 21, 2013) (citing *United Pub. Workers of Am. (C.I.O.) v.*
 20 *Mitchell*, 330 U.S. 75, 96 (1947); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 776
 21 n.14 (2d ed. 1998) ("It is a common error, but an error nonetheless, to talk of 'ninth
 22 amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule
 23 about how to read the Constitution.")).

24 To that end, as "long as Congress acts pursuant to an enumerated power, and does not
 25 exceed a 'specific limitation' on that power, an 'objection . . . that the exercise of [that] power
 26 infringes upon rights served by the ninth and tenth amendments . . . must fail.'" *Montana*
 27 *Caregivers Ass'n, LLC v. United States*, 526 F. App'x 756, 758 (9th Cir. 2013) (quoting *Barton v.*
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1 *Comm'r*, 737 F.2d 822, 823 (9th Cir. 1984) (per curiam)). Here, Plaintiffs cite no authority in
2 support of a Ninth Amendment claim, which is entirely derivative of their RFRA claim.

3 **C. Plaintiffs Should Seek an Exemption from DEA in the First Instance.**

4 As an alternative basis for resolving the instant motion, the Court should exercise its
5 discretion to decline to review Plaintiffs' claims at this juncture. Plaintiffs ask the Court to
6 order DEA to grant a religious exemption that Plaintiffs have not yet requested from DEA.
7 Plaintiffs have not argued that they are burdened by the application process under the
8 Guidance. And as a form of relief, Plaintiffs seek an injunction that amounts to an exception
9 from the CSA. As a matter of sensible governance and judicial economy, DEA should be
10 afforded the opportunity in the first instance to evaluate Plaintiffs' potential eligibility for an
11 exemption, including, but not limited to, whether Plaintiffs' current importation and
12 distribution procedures adequately protect against diversion of the controlled substance.

13 If the Court does not dismiss this action, it should stay the case until Plaintiffs complete
14 the administrative process. This approach would strike the proper balance between "the
15 agency's interest in applying its expertise, correcting its own errors, making a proper record,
16 and maintaining an efficient, independent administrative system," and Plaintiffs' interest "in
17 finding adequate redress." *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir.
18 1987). Further, Courts have discretion to decline to exercise review on administrative
19 exhaustion grounds even when the governing statutes and regulation do not make exhaustion
20 mandatory. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). DEA created a religious-
21 exemption process for petitioners who establish that the CSA burdens their sincere religious
22 beliefs. Guidance, *supra* note 1. Because Plaintiffs have not yet requested that exemption, an
23 order deferring further litigation until the administrative process has run its course is
24 warranted. *See United States v. California Care Corp.*, 709 F.2d 1241, 1248 (9th Cir. 1983)
25 (outlining factors justifying a court's discretionary power to require administrative exhaustion).

26 Such an order is proper for at least three reasons. **First**, DEA has the "agency
27 expertise" in diversion prevention "to generate a proper record and reach a proper decision"
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1 regarding possible accommodations that would both ensure that sincere religious exercise is
 2 not substantially burdened and that controlled substances are not diverted to improper, secular
 3 uses. *Id.*; see also *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1201 (9th Cir. 2008) (“The
 4 agency is thus much better situated than the district court to ‘mak[e] a proper record’ and
 5 determine the facts [at issue]”). The traditional tools of civil discovery—which are
 6 comparatively burdensome and inflexible—are a poor substitute for DEA’s pre-registration
 7 investigation process. To provide DEA with the material it needs to make an informed
 8 decision about Plaintiffs’ eligibility for a religious exemption, and to generate a complete
 9 record for possible judicial review in the court of appeals, DEA should be afforded the
 10 opportunity to create an administrative record in the first instance. **Second**, allowing an entity
 11 seeking a RFRA exemption from DEA to skip the straightforward step of requesting one from
 12 DEA “would encourage the deliberate bypass of the administrative scheme” that DEA has
 13 established to grant eligible entities such exemptions. See *United States v. California Care Corp.*,
 14 709 F.2d 1241, 1248 (9th Cir. 1983). **Third**, requesting an exemption from DEA may
 15 “preclude the need for judicial review,” preserving the resources of the parties and the Court.
 16 See *id.* Either DEA will grant Plaintiffs’ exemption request, obviating the need for any further
 17 judicial review, or DEA will deny the request and Plaintiffs will be entitled to seek review of
 18 that denial before the court of appeals on a fully developed record. See, e.g., *Perkel v. U.S. Dep’t*
 19 *of Just.*, 365 F. App’x 755, 755-56 (9th Cir. 2010). Both scenarios conserve judicial resources.

20 It is not clear why Plaintiffs have not sought an exemption directly from DEA; they
 21 make no reference to the Guidance in their Complaint. In any event, if the Court does not
 22 dismiss this action, it should enter a stay pending the administrative exemption process.

23 IV. CONCLUSION

24 For the foregoing reasons, Defendants respectfully request that the Court dismiss
 25 Counts 1 through 7 with prejudice. In the alternative, the Court should stay the case while
 26 Plaintiffs pursue a religious exception from DEA.

1 Respectfully submitted this 15th day of November, 2022.

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NOTICE OF CERTIFICATION OF CONFERRAL

I hereby certify that the parties have conferred regarding the instant motion to dismiss. The parties were unable to agree that an amendment to Plaintiffs' Complaint could cure the deficiencies addressed in the motion to dismiss.

s/ Giselle Barcia
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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing a copy to the following CM/ECF registrants:

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